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CHAN KOK SUAN

v.

HOON NIN & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-889-2007]
11 OCTOBER 2007

C ***CIVIL PROCEDURE:*** *Injunction - Interim injunction - American Cyanamid test of "serious question to be tried" - Allegation of fraudulent transfer of shares - Interim injunction to restrain dealing with shares - Whether claims arising from alleged fraudulent transfer of shares could be adequately compensated by damages*

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This matter arose in relation to disputed transfer of shares. The plaintiff claimed that he did not sign the Share Transfer Form in question. There was an expert report that the signature did not belong to the plaintiff. Whilst the defendants acknowledged that consideration of RM18 million for the shares in question was not paid, they claimed that the shares were held on trust for a company known as Selingan Jaya Sdn Bhd of which the third parties were shareholders and that Selingan Jaya had pre-agreed to have them transferred to the 2nd defendant. The defendants claimed that the transfer was made pursuant to a trust deed. The plaintiff argued that Selingan Jaya could not have been the beneficial owner of the shares and claimed that the signature on the trust deed was also forged. According to the plaintiff, there was every likelihood the defendants would proceed to transfer the plaintiff's shares to others going by the conduct of the defendants.

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Held (in favour of the plaintiff):

(1) Applying *American Cyanamid* as approved in *Keet Gerald Francis* all that the court had to decide at this stage was to determine whether there was a serious question to be tried or investigated into. (para 5)

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(2) There was ground to suspect that the share transfer may not have been made regularly. It was clear that on the face of it the shares should belong to the plaintiff had there been no valid transfer. His interest would be affected if the defendants

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proceeded to dispose them. Accordingly the 2nd defendant should be restrained from dealing with the shares in any way. (paras 6 & 7)

(3) It was however not in the interest of justice that the present *status quo* be reversed to re-transfer the shares back to the plaintiff. Any residuary claims arising from the alleged fraudulent transfer could be adequately compensated by the normal payment of damages assuming that the plaintiff was successful at the end of the trial. (para 8)

Case(s) referred to:
American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(foll)***
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(foll)***

Legislation referred to:
Companies Act 1965, s. 163(4)
Stamp Act 1949, Item 32(e) First Schedule

For the plaintiff - Lee Chan Leong (Chow Siew Lin & Tan Kim Soon with him); M/s Tan Kim Soon & Co
For the defendants - Ho Kee Tong (Razlan Hadri Zulkifli with him); M/s Gan Ho & Razlan Hadri

Reported by Amutha Suppayah

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: ***(ex-tempore)***

[1] *Inter partes* hearing.

[2] The grounds on which the plaintiff relied on in this application are as follows:

1. Refer to Share Transfer Form (encl. 8 p. 170 exh. "CKS11"). The plaintiff did not sign this form. The witness was the 1st defendant who owned 1% of the total shares of the company. We have an expert report that the signature did not belong to the plaintiff. On the contrary the witness of the plaintiff's signature has not given any affidavit to say otherwise.

2. Refer to Transfer Form itself – consideration of RM18 million for the shares was never paid. The defendants had acknowledged that no payment had been made as it is their contention that the shares were held on trust for a company known as Selingan Jaya Sdn Bhd of which the third parties are shareholders and Selingan Jaya had pre-agreed to have them transferred to the 2nd defendant. If therefore the consideration is in pursuant to a trust then the consideration should not be a sum of RM18 million. It should state that there was consideration but made pursuant to the discharge of a trust deed. The stamp duty payable should only be RM10 as there was no change in beneficial interest as per item 32(e) of the First Schedule of the Stamp Act 1949.

3. The trust deed itself – the signature on the trust deed was again alleged to have been forged. See same signature expert report in encl. 25. The person who witnessed the plaintiff's signature has not in fact witnessed the plaintiff's signature although he had signed as a signatory. The trust deed was stamped eight years later on 8 February 2007. The stamp duty on the trust deed itself did not impose any penalty for late stamping.

4. Selingan Jaya could not have been the beneficial owner on the following grounds:

i) It is a company with only RM2 paid-up capital with two shareholders. See ROC search dated 8 August 2007 (exh. "CKS15").

ii) The balance sheet did not show that there was a trust deed. It must show as asset of the company in any form going by normal accounting practice. This particular has been consistently absent since accounting for the year ending 31 December 1998 (pre-dating the trust deed by one year) until 31 December 2005.

iii) Also under article 6 of 3rd defendant company Kilat Waja Sdn Bhd (the shares the subject matter of the suit) preempted the creation of the trust deed except by court order or under the Companies Act. Under s. 163(4) of Companies Act 1965, a company is not bound to recognise any trust except if the trust is duly registered in the company's register.

5. There is every likelihood the defendants would proceed to transfer the plaintiff's shares to others going by the conduct of the defendants.

[3] Submission By Counsel For The Defendants

1. The issue of the consideration RM18 million and the stamp duty was never raised in the affidavit. The transfer was made pursuant to the trust deed and it is witnessed by a person named Lau Ban Tin who has affirmed the affidavit and he is now Tan Sri Dato' Dr. Lau Ban Tin. So it is unlikely to be untrue.

2. Other surrounding circumstances, see the following diagram: (Appendix A)

   Submits: Chng Ping Teong is a real person who set up the company Selingan Jaya and gave all the shares to the sisters.

3. All the original shares (100%) of Kilat Waja are always in the possession of Selingan Jaya by reason of the trust deed. The trust deed was drawn up as the shares originally did not belong to the plaintiff.

4. All secretarial expenses and payment are all made by Selingan Jaya. See exh. "CPT3" and also exh. "CPT4" encl. 21. This proved that Selingan Jaya is the beneficial owner who then transferred the shares to 2nd defendant. All audit fees were paid by Selingan Jaya and the original receipts are in Selingan Jaya's possession. All books of account of the 3rd defendant Kilat Waja are kept by Selingan Jaya.

5. The Power of Attorney is duly registered in the High Court and was signed by the plaintiff and witnessed by the lawyer on 9 July 2004. The PA supports the defendants' contention that at all material times the shares of the 3rd defendant do not belong to the plaintiff as beneficial owner. PA was in existence even before all these disputes came along.

6. All these disputes are family disputes and Chng Ping Teong is the "man behind" the whole set up of Selingan Jaya.

7. The trust deed was only stamped on 8 February 2007 when the disputes arose. That is why it is stamped late.

8. The argument that the trust deed is not in compliance with the requirement of the Companies Act is irrelevant as the present transactions are between the parties *inter se*.

9. Alternatively if the court is minded to allow this application I would urge this court to impose only a restricted order to injunct the defendants from transferring the shares and not the other orders preventing the defendants from proceeding to manage the company such as holding meetings, voting, etc.

[4] Reply By Counsel For The Plaintiff

1. The PA is a fabricated PA using the genuine signature of the plaintiff interfacing the page containing the signature into pages of the PA. See encl. 21 exh. "CPT7" showing at p. 3 a huge gap between the signature and the bottom of the page exposing a large space not normally obtaining in the document prepared by a solicitor. The attestation by the solicitor only appeared at the last page unnumbered. There is no initials on each and every page. The PA itself appears irregular in so far as it purports to give the power to a person called Chng Ping Teong to deal with the shares of the company of which the plaintiff owned 99%. The PA was purportedly given by the company in respect of shares belonging to shareholders.

2. Expenses incurred in managing Kilat Waja are undertaken by the same company secretary who is also managing other companies belonging to the family. There are circumstances to show that the secretary has sided with Chng Ping Teong's side for example trust deed executed by 2nd defendant in favour of Selingan Jaya.

Findings And Decision

[5] Applying *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 as approved in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293 CA all that I have to decide at this stage is to determine whether there is a serious question to be tried or investigated into.

[6] Having heard the submission of both parties, it is clear to me that there is ground to suspect that the share transfer may not have been made regularly for the reasons submitted by counsel for the plaintiff which I need not elaborate for economy of efforts.

[7] The next step that I have to decide is to determine where the balance of justice falls. It is clear to me that on the face of it the shares should belong to the plaintiff had there been no valid transfer. His interest would be affected if the defendants proceeded to dispose them. The plaintiff would lose his interest in Granasia Corporation Berhad. Accordingly there shall be an order restraining the 2nd defendant to deal with the shares in any way subject to the normal undertaking as to damages.

[8] It is however not in the interest of justice that the present *status quo* be reversed to re-transfer the shares back to the plaintiff. However any residuary claims arising from the alleged fraudulent transfer can be adequately compensated by the normal payment of damages assuming that the plaintiff is successful at the end of the trial.

Enclosure 4: Order accordingly.

Enclosure 12: Dismissed with costs for the reason that the *ex parte* injunction was granted on the basis of urgency (as per judgment delivered on 26 July 2007).

Enclosure 29: Withdrawn by consent.

[9] There shall also be an order that the 2nd defendant is to be restrained to use the voting right attached to the transferred shares to vote against the interest of the plaintiff.